U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0284 BLA

PAUL C. SHAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	DATE ISSUED: 12/21/2016
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05187) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on January 17, 2014.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with twenty-six years in underground coal mine employment, as stipulated by employer and supported by the record, and found that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge also found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, thus, his finding that claimant invoked the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Relevant to whether claimant established the existence of a totally disabling respiratory impairment, the administrative law judge initially found that none of the four pulmonary function studies in the record produced qualifying values,[4] pursuant to 20

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes fifteen or more years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-six years in underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment was performed in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718,

C.F.R. §718.204(b)(2)(i). Decision and Order at 15. The administrative law judge next considered the four arterial blood gas studies of record, conducted on March 24, 2014, July 14, 2014, September 18, 2014, and August 6, 2015.[5] 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 5, 14-16. The administrative law judge correctly noted that only the exercise portion of the March 24, 2014 blood gas study, conducted by Dr. Rasmussen, produced qualifying values, while the subsequent resting and exercise studies conducted by Drs. Cohen, Basheda, and Fino, produced non-qualifying results. Decision and Order at 15. The administrative law judge found, however, that "the only reliable exercise arterial blood gas study results in the record are those obtained by Dr. Rasmussen, which establish that [c]laimant has a totally disabling respiratory impairment" at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 16.

The administrative law judge also considered the medical opinions of Drs. Rasmussen, Cohen, Basheda and Fino, pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that the opinions of Drs. Rasmussen[6] and Cohen supported a finding of total disability, while Drs. Basheda and Fino opined that claimant does not have a disabling respiratory impairment. The administrative law judge further found, however, that due to flaws in their underlying documentation, the opinions of Drs.

Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] The March 24, 2014 blood gas study, conducted by Dr. Rasmussen, produced non-qualifying values at rest, but qualifying values with exercise. Decision and Order at 5; Director's Exhibit 14. The July 14, 2014 and September 18, 2014 blood gas studies, conducted by Drs. Basheda and Cohen, respectively, produced non-qualifying values both at rest and with exercise. Decision and Order at 5; Employer's Exhibit 1; Claimant's Exhibit 3. Finally, the August 6, 2015 blood gas study, conducted by Dr. Fino, produced non-qualifying values at rest; Dr. Fino did not perform an exercise blood gas study. Decision and Order at 5; Employer's Exhibit 4.

[6] The administrative law judge noted that Dr. Rasmussen examined claimant and performed objective testing. Based on the qualifying results of the exercise blood gas study he conducted, Dr. Rasmussen opined that claimant has a totally disabling gas exchange impairment. Decision and Order at 5-7, 15; Director's Exhibits 14, 17, 18. The administrative law judge also noted that Dr. Gaziano reviewed Dr. Rasmussen's blood gas study results, on behalf of the Department of Labor, and opined that they are technically acceptable. Decision and Order at 5.

Basheda[7] and Fino[8] did not constitute contrary probative evidence that outweighed the qualifying results produced during exercise on the March 24, 2014 arterial blood gas study. Thus, the administrative law judge concluded that claimant established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2), "through the opinions of Drs. Rasmussen and Cohen and their reliance on the exercise result of the March 24, 2014 arterial blood gas test." Decision and Order at 16.

Employer asserts that the administrative law judge mischaracterized Dr. Cohen's opinion as supporting a finding of total disability. Employer's Brief at 8. Specifically, employer asserts that, contrary to the administrative law judge's finding, Dr. Cohen did not conclude that claimant is totally disabled based on Dr. Rasmussen's exercise blood gas study results, but was simply quoting Dr. Rasmussen's own conclusions. Employer's Brief at 10. Further, employer asserts, "Dr. Cohen essentially joins Drs. Basheda and Fino in not finding total disability based upon Dr. Rasmussen's tests . . . ." Employer's Brief at 8-9. Employer's argument has merit, in part.

The administrative law judge noted that Dr. Cohen examined claimant, performed objective testing, and reviewed the objective test results obtained by Drs. Basheda and Rasmussen. Decision and Order at 10; Claimant's Exhibit 3. Dr. Cohen characterized his own September 18, 2014 exercise blood gas study as "suboptimal for functional capacity assessment," because the exercise portion of the testing was prematurely terminated. Decision and Order at 15; Claimant's Exhibit 3. The administrative law judge noted that Dr. Cohen explained that the "submaximal" nature of his own study limited his ability to make a disability determination. The administrative law judge found, however, that "[b]ased on the findings obtained by Dr. Rasmussen on exercise, Dr. Cohen concluded that [c]laimant does not retain the respiratory capacity to return to his previous coal mine employment." Decision and Order at 15.

[7] As set forth below, the administrative law judge found that Dr. Basheda's exercise blood gas study results were not reliable.

[8] The administrative law judge correctly noted that Dr. Fino did not report any exercise blood gas values, and acknowledged that the results of the six minute walk test he performed, as an alternative, were submaximal. Employer's Exhibits 4 at 7; 6 at 17. The administrative law judge further noted that Dr. Fino did not address the reliability of the exercise blood gas study results of record, except to say that Dr. Rasmussen's results had not been reproduced and that further testing was recommended. Decision and Order at 12; Employer's Exhibits 4 at 10; 6 at 23, 30.

As employer correctly asserts, Dr. Cohen did not conclude that claimant is totally disabled based on Dr. Rasmussen's blood gas results. Rather, a review of Dr. Cohen's report reveals that he was reiterating Dr. Rasmussen's own conclusions regarding the results of Dr. Rasmussen's March 24, 2014 exercise blood gas study.[9] Claimant's Exhibit 3. However, contrary to employer's contention, Dr. Cohen did not "join[ ] Drs. Basheda and Fino in not finding total disability based upon Dr. Rasmussen's [exercise blood gas] tests." Employer's Brief at 8-9. Although Dr. Cohen stated that the exercise-induced hypoxia reflected on Dr. Rasmussen's March 24, 2014 study was not subsequently demonstrated on Dr. Basheda's July 14, 2014 blood gas study, or on his own September 18, 2014 blood gas study, Dr. Cohen did not opine that this called Dr. Rasmussen's qualifying exercise blood gas study results into question. Claimant's Exhibit 3. Rather, Dr. Cohen explained that because the two subsequent studies were "sub-maximal" they "may be underestimating any gas exchange abnormality that might be present." *Id.*

The administrative law judge's conclusion that claimant established the existence of a totally disabling respiratory impairment was based on his rational determinations that Dr. Rasmussen's March 24, 2014 qualifying exercise blood gas study results are "the only reliable exercise arterial blood gas study results in the record," and that "the record does not contain contrary probative evidence to rebut . . . these test results." *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002) (holding that it is the function of the administrative law judge to review the physicians' opinions); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 16. As employer has not shown how Dr. Cohen's opinion constitutes contrary probative evidence sufficient to rebut Dr. Rasmussen's qualifying exercise blood gas study results, we hold that the administrative law judge's error in mischaracterizing Dr. Cohen's assessment of claimant's impairment is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

Employer also argues that, in finding total disability established, the administrative law judge erred in failing to "explain why he rejected Dr. Basheda's explanation of a medically coherent reason of underlying cardiovascular disease for the inconsistency in the [arterial blood gas study] results." Employer's Brief at 12. We disagree.

[9] In a report dated April 17, 2014, Dr. Rasmussen found that the results produced on the arterial blood gas study he administered on March 24, 2014 "indicate marked loss of lung function as reflected by his impairment in oxygen transfer and hypoxia during exercise." Director's Exhibit 14. Dr. Rasmussen further opined that, "[b]ased on these studies, [claimant] does not retain the pulmonary capacity to perform his regular coal mine employment." *Id.*

Dr. Basheda examined claimant, performed objective testing, and reviewed the available test results of record, including the blood gas studies performed by Dr. Rasmussen. Dr. Basheda opined that claimant does not have a disabling pulmonary impairment based, in part, on the non-qualifying results of the exercise blood gas studies he conducted. Decision and Order at 15; Employer's Exhibit 1. The administrative law judge noted that, according to Dr. Basheda, the fact that his own July 14, 2014 exercise blood gas testing showed no evidence of exercise-induced hypoxemia or ventilatory failure demonstrated that the exercise-induced hypoxemia measured by Dr. Rasmussen had resolved, and supported the conclusion that claimant does not have a totally disabling respiratory or pulmonary impairment.[10] Decision and Order at 8; Employer's Exhibit 1 at 13. The administrative law judge permissibly found, however, that Dr. Rasmussen questioned the reliability of Dr. Basheda's July 14, 2014 non-qualifying exercise blood gas study results[11] and that, when given the opportunity, Dr. Basheda did not offer any additional information to establish the credibility of his blood gas study testing.[12] Decision and Order at 15; Employer's Exhibit 5. Moreover, the administrative law judge noted that Dr. Basheda acknowledged that Dr. Rasmussen's arterial blood gas testing was more sophisticated than his own. Decision and Order at 9, 15; Employer's Exhibit 5 at 22, 26. *See Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Clark*, 12 BLR at 1-155; Decision and Order at 15. Thus, contrary to employer's contention, the administrative law judge permissibly concluded that Dr. Basheda's opinion did not constitute contrary

[10] We further note that the Act's implementing regulations do not attribute less significance to qualifying results in a claimant with cardiac disease. 20 C.F.R. §718.204(b)(2)(ii); Appendix C to 20 C.F.R. Part 718.

[11] Specifically, Dr. Rasmussen opined that because Dr. Basheda's test results lacked basic information such as the type and duration of exercise, heart rate at rest and during peak exercise, the source of the sample, and whether it was from an indwelling arterial catheter or a single stick, Dr. Basheda's study was "virtually not interpretable and of little or no use in assessing [claimant's] gas exchange impairment." Director's Exhibit 18 at 1-2. Thus, Dr. Rasmussen concluded that Dr. Basheda's testing did not alter his opinion that claimant has a totally disabling gas exchange impairment.

[12] The administrative law judge noted that Dr. Basheda acknowledged that claimant's heart rate was not recorded on his testing and stated that he simply assumed that because his technicians did not report any abnormalities, none existed. Decision and Order at 15; Employer's Exhibit 5 at 22-23. The administrative law judge further noted that Dr. Basheda could not specifically describe the intensity of the exercise claimant underwent, and did not indicate whether the exercise blood gas sample was taken from an indwelling catheter or a single stick. Decision and Order at 15; Employer's Exhibit 5 at 25-26.

probative evidence sufficient to rebut Dr. Rasmussen's March 24, 2014 qualifying exercise blood gas study results. *See Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Clark*, 12 BLR at 1-155. Consequently, we reject employer's argument that the administrative law judge erred in rejecting Dr. Basheda's opinion.

As the trier-of-fact, the administrative law judge is charged with assessing the credibility of the medical opinion evidence, and assigning those opinions appropriate weight. *See Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark*, 12 BLR at 1-155. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because employer does not assert any other specific error by the administrative law judge, we affirm the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

In light of our affirmance of the administrative law judge's findings that claimant established twenty-six years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Moreover, because employer does not challenge the administrative law judge's finding that it failed to establish rebuttal of the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established his entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge